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Supreme Court of the United States

OCTOBER TERM, 1941

Nos. 687 and 688

UNITED NEW YORK SANDY HOOK PILOTS ASSOCIATION and UNITED NEW JERSEY SANDY HOOK PILOTS ASSOCIATION, as owners of the Pilot-Boat SANDY HOOK, in their own behalf, etc.,

Libelants-Petitioners,

against

The Norwegian passenger Motorship OSLOFJORD, etc.,

and

DEN NORSKE AMERIKALINJE A/S (The Norwegian America Line), a Norwegian corporation, and owner of the Motorship OSLOFJORD,

and

OIVIND LORENTZEN, as Director and Curator of Shipping of the Royal Norwegian Government, on behalf of The Royal Norwegian Government and of DEN NORSKE AMERIKALINJE A/S,

Respondents.

And Cross Suit.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI

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BRIEF FOR RESPONDENTS

The respondents herein oppose the issuance of the writs of certiorari prayed for in the petition.

The opinion of the District Court is reported in 35 Fed. Supp. 150 and is printed at pages 338 to 345 of the record. The opinion of the Circuit Court of Appeals is reported in 121 F. (2d) 304 and is printed at pages 370 to 380 of the record.

I

Reasons for Denying the Writs of Certiorari.

(1) The case presents no question of general interest or importance. It involves an ordinary collision in fog, brought about by the negligent act of the Sandy Hook in changing her course and turning directly across the Oslofjord's bows. The only point raised by the petition is whether the Oslofjord violated the provision of Article 16 of the International Rules, to the effect that a vessel, hearing forward of her beam the fog whistle of another vessel whose position is not ascertained, shall stop her engines. The Circuit Court of Appeals (R. p. 372) found that the Oslofjord, when she heard the fog whistle of the Sandy Hook, actually knew the Sandy Hook's position and therefore was not obliged to stop her engines at that time. Both Courts below found that thereafter the Oslofjord navigated with caution, as required by the rule.

(2) The petition (p. 6) states that the decision of the Circuit Court of Appeals "conflicts with the rulings of other maritime courts relating to navigation in fog and is in direct conflict with the weight of authority on the subject". The petition cites no case which supports the foregoing statement.

(3) Even if the Oslofjord had been at fault in the respect alleged, that fault was so remote as not to constitute a cause contributing to the collision.

II

The Facts.

A few further facts regarding the collision should be stated.

1. The area in which the pilot-boat customarily meets incoming vessels is between the Ambrose Lightship and the Whistling Buoy or Sea Buoy, located about a mile further in towards the harbor (Bull p. 174, fol. 522; see chart, R. p. 320). It is very rare that the pilot-boat goes outside of the Lightship into the open ocean to meet a vessel. The officers of the Oslofjord testified that, in some hundreds of trips (Bull p. 159, fol. 476; Thorsen p. 216, fol. 648), they had never once known the pilot-boat to come outside the Lightship (p. 174, fol. 522; pp. 221, 222, fols. 663, 664). The Sandy Hook's witnesses could point to no instance in which the pilot-boat had done so, save a few exceptional cases, where incoming ships had signalled that they had anchored or stopped and were waiting outside (p. 61, fol. 181; p. 100, fol. 299; pp. 244, 245, fols. 732, 733). Accordingly, the Circuit Court of Appeals found (p. 370) that it is "by far the most common, though not the absolutely universal practice" for incoming vessels to meet the pilot-boat in the close vicinity of Ambrose Lightship and inside of it.

In accordance with this well understood practice, the Sandy Hook, on the same morning and before the collision, had put pilots on four incoming vessels close to and inside of the Lightship (Sullivan pp. 79-83, fols. 235-248; answers to interrogatories p. 27, fols. 80, 81; Sandy Hook logs pp. 30, 131). In the case of one other vessel which had arrived that morning, there was no available record of the position (p. 82, fol. 245; p. 27, fol. 80).

2. A vessel coming in from the east, as the Oslofjord was doing, is obliged to change her course gradually to

starboard as she approaches the Lightship, in order to round up towards it and to get on the proper course to proceed on up Ambrose Channel. This is obviously necessary, for otherwise the vessel would run by her destination and would eventually go ashore on the coast of New Jersey. The pilots desire incoming vessels to navigate in this manner, in order that they may be on a proper heading to go up the channel (Bull p. 166, fol. 497) and the pilots testified here that they expect vessels to make such an alteration of course, until they are lined up approximately for the channel, which runs 296° 54′ true (Sullivan pp. 86, 87, fols. 258, 259; Lowe p. 99, fol. 297; Goetz pp. 120, 121, fols. 360-362). The Oslofjord altered course in this way, little by little, between 6.10 A. M. and 6.19 A. M., until she was on a course of 296°, which is the equivalent of 297° by her gyro compass (Bull p. 165, fols. 493, 494; p. 166, fol. 497; p. 163, fol. 487).

The Oslofjord, therefore, pursued the usual course and that which the pilot-boat was bound to anticipate, and the Court below so found (Opinion p. 370).

3. The parties agree that the customary manoeuvre in putting a pilot aboard, is for the pilot-boat to round under the stern of the vessel and then to come alongside from aft, near enough to send the pilot aboard in a yawl (Halliday pp. 53, 58, fols. 157, 158, 173; Sullivan p. 65, fols. 193, 194; Lowe p. 99, fols. 296, 297).

4. After putting the pilots on board the five vessels already referred to, the Sandy Hook lay drifting in the vicinity of the Lightship (Sullivan p. 63, fol. 189). Her navigators had heard the Oslofjord's whistles approaching from the east and, as the Sandy Hook drifted, they heard what they mistakenly thought was a signal of two long whistles from the Oslofjord, indicating that she was lying motionless (Sullivan pp. 66, 84, 94, fols. 196, 250, 251, 281-283; Goetz pp. 107, 125, fols. 319, 373). It is now conceded, as was found by both Courts below (Opinions pp. 339, 370),

that the Oslofjord did not blow any such signal; but, under the erroneous impression that the Oslofjord was waiting outside, the pilot in charge of the Sandy Hook and her mate, after consultation between themselves (pp. 84, 107, fols. 250, 251, 319), decided to take the unusual course of running out to her, which they accordingly did. The Oslofjord was proceeding at dead slow on the correct course for the channel and was sounding fog whistles which the pilot-boat heard, and from which the pilot-boat knew that the Oslofjord was under way (Bull p. 167, fol. 500; Sullivan p. 95, fol. 284; Goetz pp. 108, 120, fols. 324, 360). Nevertheless, those on the Sandy Hook wrongly supposed that they were on the Oslofjord's port bow (Goetz pp. 122, 129, 130, fols. 364, 387, 388), though proper attention to her whistles would have shown the contrary. Without waiting to verify their position, without stopping their engines, and *before they had seen the Oslofjord at all,* they put their rudder right and then hard right, with the result that they swung the Sandy Hook directly in front of the Oslofjord (Goetz pp. 108, 122, fols. 324, 365, 366; Sullivan pp. 67, 70, 72, 90, 91, fols. 200, 208, 209, 214, 268-271).

This was not an error *in extremis,* as suggested in the petition, because (1) it was done, not under fear of imminent collision, but more than a minute before the collision (p. 343, fol. 1028) and simply because of a careless mistake in determining the Oslofjord's heading; and (2) a vessel cannot invoke the doctrine of error *in extremis,* if the emergency was wholly or partly her own fault (the *Dexter,* 23 Wall. 69, 76; the *Elizabeth Jones,* 112 U. S. 514; the *Protector,* 113 Fed. 868; the *Paris,* 37 F. [2d] 734, 740, aff'd 44 F. [2d] 1018).

The navigators of the pilot-boat did not see the Oslofjord until the pilot-boat had made her swing and was already across the Oslofjord's bow (Sullivan pp. 91, 93, fols. 272, 278; Goetz p. 123, fol. 368). They then tried to escape by going at full speed, but were unsuccessful (pp. 70, 72, 127, fols. 208, 214, 380).

The cause of the collision, therefore, was the negligent error of the Sandy Hook in turning directly in front of the Oslofjord, without having seen her and without having correctly appraised her position, and the Courts below so found (Opinions pp. 342, 343, 370, 371).

5. With regard to the Oslofjord's speed, both Courts below found that she was navigated with all due caution, and at speeds which were proper under the circumstances (Opinions pp. 344, 345, 371-373).

III

Argument.

A. The Circuit Court of Appeals did not misapply Article 16.

1. The Oslofjord, running at slow, had been hearing the Lightship's fog whistle since 4.20 A. M. (equivalent to 9.20 Greenwich mean time), and had been taking radio bearings of its direction (Exhibit L, pp. 165, 166, fols. 495, 496, reproduced opposite p. 20). At or shortly before 6 A. M., the distinctive whistle of the pilot-boat was heard, recognized and observed (Bull pp. 162, 169, 191, 192, 196, 197, fols. 486, 506, 571, 574, 588, 589; Thorsen p. 219, fol. 655). The position of the Lightship was, of course, known. The pilot-boat's position was ascertained to be *on the pilot-station, near the Lightship and a little to the westward (to the left) of it* (Bull pp. 191, 192-196, fols. 571, 574-586). She was still "far away" (p. 195, fol. 583). The actual distance works out as between two and three miles.

This position was correctly ascertained; for the pilot-boat's own evidence shows that at 5.50 A. M., she put a pilot on the Quirigua, well inside the Lightship "a little south of the line between Ambrose Lightship and the Whistling Buoy"; and at 6.05 A. M. she put a pilot on the Monarch of Bermuda in nearly the same place (pp. 27, 30, 36; see chart p. 320).

This corresponds with the Oslofjord's location of the Sandy Hook as being near the Lightship and (from the Oslofjord) a little to the left of it (Circuit Court of Appeals Opinion p. 372). That was her regular station.

The petitioner argues that Article 16 requires that the position be *exactly* and *precisely* ascertained. No case has ever so interpreted the rule and a moment's reflection will show the utter impracticability of any such interpretation. The rule presupposes that there is a fog, so that the other vessel cannot be seen. Obviously, if the rule meant that one vessel must stop until the *exact* position of the other vessel (in this case some miles away) was determined, then the approaching vessel would have to stop and wait until the fog cleared, because she could by no means ascertain the exact position until she could see the other vessel.

The meaning of the rule was clearly and sensibly defined in *Nippon Yusen Kaisha* v. *China Nav. Co.*, 1935 Appeal Cases 177, as follows:

> "In order that the position of a vessel may be ascertained by another vessel within the meaning of the Regulation, she must be known by that other vessel to be in such a position that both vessels can safely proceed without risk of collision."

That is the law both of England and of common sense. There is no American case to the contrary.

Here was the Oslofjord approaching a familiar Lightship, where there was a recognized place of rendezvous with the pilot-boat. The Oslofjord was more than two miles off. She heard the signal of the pilot-boat, which was then ascertained, and correctly ascertained, to be at the usual place. Must the Oslofjord stop and wait two miles away because she could not tell just how many yards the pilot-boat was from the Lightship? It was clearly safe for her to proceed with caution, and both Courts below have found that in fact she used all due care in doing so.

It is further to be remembered that this was not the ordinary case of two navigating vessels which intended to pass each other, preferably at a considerable distance. On

the contrary, the object of the two vessels was to approach each other, in order to permit the pilot-boat to put a pilot on the Oslofjord. They were not seeking to avoid each other, but to approach closely enough for the purpose stated.

It may well be that the degree of exactness with which the other vessel's position must be ascertained may vary with the distance. If the fog whistle of a vessel is heard apparently only one hundred yards away, a very much greater accuracy in ascertaining her position is possible and is necessary for safety than if the whistle heard is several miles away. Here we are dealing with the latter situation. The whistle was upwards of two miles off and, moreover, it was recognized as the whistle of a pilot-boat known to be on a definite pilot-station.

2. The Oslofjord ran at slow until 5.45 A. M.; at dead slow until 6.02, when the fog lifted so as to give half to three-quarters of a mile of visibility; then at slow until 6.10, when the fog increased and the whistles of an approaching tow were heard (Bull pp. 162, 163, 188, 189, fols. 486, 487, 564, 565; Thorsen p. 217, fol. 649; Fiskerstrand pp. 297, 298, fols. 890, 891, 892). Then the Oslofjord stopped her engines and they remained stopped *for nine minutes* (Bull pp. 163, 164, fols. 487, 490; Thorsen p. 217, fol. 649). During this time, her headway fell off until she was almost at a standstill and her course was gradually changed from 269° true to 296° true,—the channel course, on which the pilots expected her to approach (Bull pp. 165, 167, 198, fols. 493, 494, 500, 592-594). She ascertained that the whistle of the pilot-boat was still close to the Lightship (as in fact it was), and that at 6.19 it bore 315° true from the Oslofjord (Bull p. 165, fol. 494; Thorsen p. 217, fol. 651). So, not only did she ascertain the position of the pilot-boat when she first heard it, but she stopped her engines, ran off nearly all her headway and ascertained it again when she got closer. Her speed at this time (6.19) was not more than 1 to 2 knots (Bull pp. 168, 189, 273, fols. 502, 565, 817;

Thorsen p. 217, fol. 650). Then, at 6.19, she started her engines at dead slow (Bull p. 167, fols. 500, 501) to reach the rendezvous. Thereafter, at about 6.20 (District Court Opinion p. 342) the Sandy Hook started to run outside the Lightship, under the mistaken impression that the Oslofjord was lying still to wait for her there. As she proceeded, she heard the Oslofjord's fog signals of one whistle and thereby she knew that the Oslofjord was moving, but she negligently misapprehended the Oslofjord's heading, although it was just what she was bound to anticipate, and she made the fatal mistake of turning across the Oslofjord's bows without reducing her speed and without knowing the Oslofjord's heading.

Up to 6.22, the Oslofjord, as she advanced, had been hearing the pilot-boat's whistle drawing aft on her starboard side,—an indication of safety (Bull pp. 169, 170, fols. 506-508). As soon as the sound of the whistles suggested that the pilot-boat might be coming outside of the Lightship, the Oslofjord stopped her engines, and reversed them when the pilot-boat's sudden change of course created danger of collision (Bull pp. 169-171, fols. 506, 511; Thorsen pp. 218, 219, fols. 654, 657). The Oslofjord's headway was all but off when the collision occurred, at about 6.24 (Bull pp. 171, 172, fols. 513, 514; Thorsen pp. 219, 227, fols. 657, 681).

All of this navigation was careful and prudent and all questions of fact as to its propriety have, it is submitted, been settled by the concurrent findings of the District Court and of the Circuit Court of Appeals.

It will be noted from the foregoing (1) that the Oslofjord knew the true position of the pilot-boat at the time when she first heard her whistles and that, therefore, she fulfilled the requirements of Article 16; (2) that thereafter she stopped her engines for a period of 9 minutes, 6.10 to 6.19, during which time she came almost to a standstill and she then again correctly checked the position of the pilot-boat. She did not violate Article 16 or any other rule of navigation.

B. The alleged fault was too remote to constitute a contributing cause of the collision.

Nothing that happened at or before 6 A. M. had the remotest connection with the collision at 6.24. The Oslofjord, as already noted, was nearly at a standstill at 6.19. She then put her engines at dead slow ahead for the purpose of approaching the pilot-boat, which was still drifting near the Lightship. This engine order, of course, increased her headway somewhat. From that point on, her speed was in obedience to that engine order. She was no longer running out the headway which she had previously had, but she had a new speed, based upon a new order. If that new speed had been too great (as both courts below found that it was not), her fault would have been at that point. Anything earlier is too remote from the collision to be legally relevant.

That is the distinction between this case and that of *Lie* v. *San Francisco & Portland SS. Co.*, 243 U. S. 291, on which the petitioners rely. In the *Lie* case, the vessel was guilty of a clear breach of Article 16 because, although she had not ascertained the position of the other vessel, she continued to operate her engines ahead for several minutes after she first heard the approaching whistle, and then stopped them and began to run out the headway which she had. She was still moving under that same headway at the time when the collision occurred. That fact was emphasized by this Court at page 298 of its opinion. The facts here are wholly different. The Oslofjord's headway was the result of the dead slow ahead order at 6.19 and had nothing whatever to do with the question of whether or not she stopped her engines at or before 6 A. M.

It is, of course, well settled that prior speed not contributing to the collision is immaterial.

In *The Ludvig Holberg*, 157 U. S. 60, 67, this Court said:

> "* * * She was clearly not bound to stop solely on account of the fog, and if she had been running dead slow for four or five minutes before the collision, she

cannot be held in fault for what her previous speed may have been. If she ran twenty miles an hour down to the Narrows, and was running dead slow at the time she first heard the tug's whistle, fault could not be imputed to her for her previous speed."

In *Steffens* v. *United States*, 32 F. (2d) 206, 207, the Circuit Court of Appeals for the Second Circuit said:

> "The appellant charges her with fault for her earlier speed and in this we are in accord; but if the times recorded in the engine room are correct, it seems to us that it could not have contributed. Her slow speed signal was at 10.05 and the collision was at 10.19. A lapse of nearly a quarter of an hour must have run off the higher speed and made her dependent for her forward motion upon the power which the propeller continued to give."

IV

CONCLUSION

The present case is of the familiar type of collision in fog brought about by a negligent change of course by one of the vessels. It is submitted that it involves no important question of law. The Oslofjord was navigated with extraordinary caution. She ascertained the position of the pilot-boat when she first heard its whistle, and the Circuit Court of Appeals correctly held that, by so doing, she complied with the law and was not obliged to stop her engines to avoid collision with a pilot-boat which was on her known station upwards of two miles away.

The petition should be denied.

New York, N. Y., October 24, 1941.

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